In the

Supreme Court of the United States

OCTOBER TERM, 1942.

No.....

KANSAS CITY LIFE INSURANCE COMPANY, a Corporation, PETITIONER,

v.

CARRIE J. PARFET, Administratrix of the Estate of George W. Parfet, Deceased.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in this case is reported in *Carrie J. Parfet, Administratrix of the Estate of George W. Parfet, Deceased, Appellant, v. Kansas City Life Insurance Company, a Corporation, Appellee,* No. 2395, 128 Fed. (2d) 361. This decision was rendered on May 18, 1942, and is found in the Record on page 153. The memorandum opinion of Judge Symes, of the District Court, (not reported) rendered May 23, 1941, is found in the Record, pages 18-20.

II.

JURISDICTION.

The jurisdiction of the court is invoked under Sec. 240 (a) of the Judicial Code as amended by the act of

February 13, 1925. The judgment of the United States Circuit Court of Appeals was entered on May 19, 1942, (R. p. 157).

III.

STATEMENT OF THE CASE.

A statement of the case is contained in the Petition for a Writ of Certiorari at page 3.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In reversing the judgment of the lower court and remanding the cause for a new trial.

(2) In holding that it was reversible error in a civil case to answer the question of the jury as to motive outside the presence of counsel even though the answer was correct and had already been covered in the instructions given to the jury.

(3) In holding that it was reversible error to receive a communication from the jury and make reply thereto in the absence of the parties or their attorneys even though substantial prejudice was not shown.

(4) In disregarding Sec. 391, Title 28, U. S. C. A., and Rule 61 of the Federal Rules of Civil Procedure, which prescribed that the court must disregard any error in the proceedings not affecting the substantial rights of the parties and that no error in anything done by the court is ground for setting aside a verdict or disturbing a judgment unless refusal to take such action appears to the court inconsistent with substantial justice.

(5) In holding the Colorado rule in an action on an accident policy to be that where death by violence can be explained on any reasonable hypothesis other than

suicide, it is the duty of the court or jury to do so, and in holding that such rule is applicable to this case.

(6) In holding that the federal courts were bound by the so-called Colorado rule.

(7) In holding that the evidence was not such as to require a verdict for defendant.

(8) In holding that the trial court erred in excluding a conversation between insured and his son 50 days prior to the explosion which caused insured's death.

V.

ARGUMENT.

An examination of the record in this case is convincing that the trial was fair and the verdict of the jury in accord with the very great preponderance of the evidence. The evidence throughout was undisputed save on one minor point. There was no dispute as to the actions and statements of the decedent at the time of the explosion. There was no dispute as to his cheerful disposition, happy family life and plans for the future. There was no dispute that dynamite could be accidentally exploded in various ways, but there was no evidence offered that it was so exploded. The only point on which there was a conflict in the evidence was on the question as to whether on the night before and for the few minutes immediately preceding the explosion decedent appeared overwrought (R. pp. 76-78). In view of his statements as to why he had committed suicide and his pounding of the second batch of dynamite, that question was of minor importance.

The trial lasted for two days and the jury of twelve men brought in a verdict for the defendant. The evidence was such as to make it perfectly clear to any ordinary person, unhampered by technical rules as to presumption, burden of proof, etc., that the decedent had not died by

accident, but had committed suicide.* The coroner so found and reported in his official certificate, and the jury of twelve, despite the well-known prejudice of juries against insurance companies, also found that there was no accident but that the decedent had committed suicide. The District Judge who heard the case and saw the witnesses and heard the arguments of counsel thought the

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*(R. p. 28) RUTLEDGE: "Q. As you got up to him did you see what he was doing? A. Yes, sir. He was pounding on a cap with a file. Q. You mean a dynamite cap? A. Yes, sir. Q. Is that used to set off an explosion of dynamite? A. It is. Q. Were there sticks of dynamite placed near the cap? A. Yes, there were."

(R. p. 30) "Q. Did you ask him why he had done it? A. I did. Q. And what did he say to that? A. He says 'I am in a jam.' Q. And then what did you say? A. I says 'You are not in a bad enough jam to want to kill yourself.' Q. And what was his reply to that? A. He said 'Yes, I am,' or something to that effect."

(R. p. 48) HOWLETT: "A. When I first came up I said 'How in the world did this happen?' and he said 'I did a bum job of it.' Then I said 'Did you do this, George?' and he didn't answer me. In a few seconds I said 'What made you do it?' and he said 'I am in a terrible jam.' I didn't have any more conversation with him right at that time. I looked about his general physical condition, and gave him something to relieve pain, and later I asked him what kind of a jam he was in, and he said 'In every way,' and I asked him if he was in a jam with some girl, or if he had embezzled some money, or why in the world he would do something like that, and he said no, it wasn't anything like that. Then I said 'What kind of a jam are you in?' and he said 'In every way,' and then his head went over, and he was unconscious, and he didn't talk any more. * * * Q. Do you recall any conversation with Mr. Parfet? You haven't testified relative to whether he was going to live. A. Yes, sir, there was. He asked me if I thought he would make it, and I says 'Yes, George, I think you will,' and he said 'For Christ's sake give me something to put me out.'"

matter so clear that no other verdict was possible under the evidence and so stated in denying plaintiff's motion for a new trial. It seems impossible that anyone could hold that plaintiff sustained the burden of proving accident.

An analysis of the Circuit Court's opinion overturning the jury's verdict and sending the case back for a new trial shows that it was based on what it conceived to be two errors. The first of these was the technical ground that the Judge answered the jury's question with the word "No" outside the presence of counsel instead of in their presence. The court concedes that answer was correct.* The matter had already been fully covered in the instructions given to the jury to which no objection was made by plaintiff, and it would seem that there could hardly be even a gossamer possibility of actual prejudice from this action of the court.

The Circuit Court in its opinion by conceding the correctness of the answer, hinges its reversal on a bare formality. There may be some justification for this careful regard for the minutiae of procedure in criminal cases where the law throws every protection around the accused, but it is difficult to understand the profound veneration of this formality** in a civil case where substantial

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*See *New York Life Ins. Co. v. Sparkman,* 101 Fed. (2d) 484, 487 (C. C. A. 5): "A motive for suicide is helpful to the defense but is not essential. * * * This is so because in this life men who have no apparent motive for it do commit suicide. Perhaps always in the case of a sane person who commits suicide there is a motive, but in many cases the motive is not and possibly could not be proven."

**"*Kimmins v. Montrose,* 59 Colo. 578, 581, 151 Pac. 434: "Good practice required that the court before giving this instruction should have called the jury into the court room and read it to them in the presence of counsel for both sides, unless they waived this *formality.* * * *

"*Moffit v. People,* 149 Pac. 104. While the giving of

justice was clearly done and the trial was obviously fair, and in the face of Rule 61 and the statute.

While in effect holding that the court's action was per se reversible error without regard to prejudice, the Circuit Court nevertheless was apparently not quite convinced of the correctness of its position on that point for it felt obliged to answer defendant's argument that no prejudice could by any possibility have resulted because on the evidence no other verdict could have been rendered.*

In attempting to show that it was possible that a verdict for plaintiff could have been sustained, the Circuit Court was confronted with the many federal cases, including those of the Tenth Circuit, which had held that when from the evidence the conclusion of non-liability was as reasonable as that of liability, a verdict for plaintiff rests on surmise and cannot be upheld.**

The Court in this case was confronted with the purely speculative theories of the plaintiff that the dynamite might have been exploded by a match, or a cigarette, or

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the instruction in this manner was *bad procedure,* we cannot hold it to be reversible error, because it does not appear that it in any manner prejudiced the rights of the defendant." (italics supplied) citing *Moffit v. People,* 59 Colo. 406, 149 Pac. 104; see also *Slack v. Stephens,* 19 Colo. App. 538, 76 Pac. 741; *Tilley v. Montelius Piano Co.,* 15 Colo. App. 204, 61 Pac. 483.

*See statement of this rule in 5 C. J. Sec. 1676, p. 805, and 3 Am. Jur., §§ 1111, 1112, p. 634, and Chicago, Milwaukee & St. P. Ry. Co. v. Ross, 112 U. S. 377, 28 L. Ed. 787.

**N. Y. Life Ins. Co. v. Doerksen (C. C. A. 10) 75 Fed. (2d) 96, 99 (accident insurance case); Equitable Life Assur. Society v. Guiou (C. C. A. 8) 86 Fed. (2d) 865, 868 (life insurance case); Scales v. Prudential Ins. Co. of America (C. C. A. 5) 109 Fed. (2d) 119 (accident insurance case); Frankel v. New York Life Ins. Co. (C. C. A. 10) 51 Fed. (2d) 933 (accident insurance case); AT&SF Ry. Co. v. Toops, 281 U. S. 351 (negligence case).

a richochet bullet, or by being stepped on. There was no evidence that any of those things actually happened. Had any of them happened, the insured would certainly have said so instead of saying he was in a bad enough jam to want to kill himself. There was no unexplained violence whatever.

As the Circuit Court of Appeals for the Eighth Circuit said in *Equitable Life Assur. Soc. v. Guiou,* 86 Fed. (2d) 865, in holding that under a straight life insurance policy, where the defense was suicide, the evidence for plaintiff was not sufficient to take the case to the jury (p. 868):

> " * * * But verdicts must be rested upon substantial evidence and vague possibilities conjured up or conjectured by fertile minds do not suffice."

The Circuit Court of Appeals for the Tenth Circuit itself said in *New York Life Ins. Co. v. Doerksen,* 75 Fed. (2d) 96, the question being accident or suicide under a double indemnity policy (p. 99):

> "But it is not enough that under the facts liability might exist; if a different conclusion may as reasonably be drawn from the facts, then the jury may not guess as between equally probable causes."

And on p. 98 the same court says:

> " * * * if such evidence left the question so open that a conclusion of non-liability is as reasonable and plausible as the conclusion of liability, then the verdict rests on surmise and must be set aside. The Supreme Court of the United States has steadfastly adhered to this rule in a long line of cases commencing with *Patton v. Texas & Pac. R. Co.,* 179 U. S. 658, 663."

In *Frankel v. New York Life Ins. Co.* (C. C. A. 10) 51 Fed. (2d) 933, the court held that the presumption against

suicide, a composed mental attitude and a motive opposed to self-destruction together with the possibility of accident were not sufficient to send the case to the jury. The decedent in that case was found at the rear of his store with a bullet in his head and a pistol beside him. Plaintiff contended that he might have been assassinated or that he might have stumbled and accidentally discharged the weapon. But the court held all that was purely speculative, saying (p. 935):

> "The administratrix was not entitled to have this unfortunate case submitted to the jury. A finding in her favor could not be allowed to stand and the trial court would have been required to set it aside in the exercise of sound judicial discretion."

In *Scales v. Prudential Ins. Co. of America,* (C. C. A. 5) 109 Fed. (2d) 119, in a double indemnity case, the evidence was lack of motive for suicide, happy disposition, pleasant family relations, and that the pistol which killed him and which was found beside him had gone off in the past in an unexplainable manner. But the court instructed a verdict for the defendant, holding that the presumption against suicide together with the possibility that it might have gone off accidentally while deceased was holding it up to the light while looking down the barrel was not sufficient to take the case to the jury.

In the face of these opinions of the Tenth Circuit and of the other circuits where precisely the same type of evidence as was offered by the plaintiff in this case was held insufficient to take the case to the jury, the Circuit Court rested its opinion that it was possible that a verdict for plaintiff could have been sustained in this case, on the ground that the Colorado Supreme Court in *Prudential Ins. Co. of America v. Cline,* 98 Colo. 275, 57 Pac. (2d) 1205, had laid down a special rule and had held that the judge and jury must hold against suicide

and for accidental death if there is any reasonable hypothesis in the evidence on which this can be done, thus virtually requiring proof by defendant beyond a reasonable doubt. The case relied on, however, does not support the court's position as it was a straight life insurance case in which the rule is the exact opposite of that applicable in actions for accidental death, as we will point out in a later section of our brief.

The error in the interpretation of the Colorado law is clear. Furthermore, in order to get away from the fact that the United States Supreme Court in *New York Life Ins. Co. v. Gamer,* 303 U. S. 161, had held the opposite rule to apply in the federal courts, clearly placing the burden of proof on the plaintiff to prove accidental death, as had the decisions both in the Tenth Circuit and in other circuits hereinbefore cited, the Circuit Court was obliged to in effect hold that this so-called Colorado rule was binding on the federal court here. The net result was the adoption of a rule of proof in this case in conflict with both the true Colorado rule and with the rule of the United States Supreme Court and the federal courts generally. Furthermore, the ruling by implication that the federal court was bound by the so-called Colorado rule is in conflict with the rule prevailing in many other circuits and probably with that adopted by the United States Supreme Court in *Herron v. Southern Pacific Ry. Co.,* 283 U. S. 91, 75 L. Ed. 857.

Only one other error is mentioned by the Circuit Court of Appeals, to-wit: The exclusion of decedent's statement as to future plans. The matter was considered by opposing counsel of such slight importance that they did not even mention it in their motion for a new trial (R. pp. 14-17). That this exclusion, if error, was harmless is obvious from a consideration of the evidence. Three other witnesses, including one of the defendant's, testified to the fact that decedent had future plans and their

testimony was undisputed (R. pp. 73, 82, 94, 95). They were the same plans covered in the excluded evidence; which was offered. In the entire course of the trial it was never once disputed in any way that decedent had had plans for the future. The court in instructing the jury, twice called their attention to the evidence that decedent did have future plans (R. pp. 145, 146). The testimony excluded was as to a statement by decedent made about 50 days prior to the explosion causing his death. The only evidence in the entire record as to his having a disturbed mental condition related to the period within a week of his death after some possible financial irregularities in the district for which he was responsible as county commissioner were brought to his attention by the state treasurer. Under the circumstances of the case, the testimony would seem too remote to bear on any issue in the case, but in any event the exclusion was harmless since other undisputed testimony clearly showed that at a time quite close to the date of his death he did have these future plans for himself and his son—plans which were testified to by defendant's own witness (R. p. 73).

THE COURT'S RULING THAT THE TRIAL JUDGE'S COMMUNICATION TO THE JURY OUTSIDE THE PRESENCE OF COUNSEL PER SE CONSTITUTES REVERSIBLE ERROR IS CONTRARY TO SANDUSKY CEMENT CO. v. A. R. HAMILTON CO. (C.C.A. 6) 287 FED. 609, AND OTHER CASES.

In the *Sandusky* case, *supra,* (pp. 610, 611):

> "While the jury was deliberating, it sent a written communication to the trial court reading as follows: 'There seems to be a division of the jury over your instructions on this point, viz: Is the Hamilton Company liable under this contract in any one month more than the pro rata share?' At the time this communication reached the court neither of the parties or their counsel were present. The court was then engaged in the trial of another cause and, without giving counsel an opportunity

to be present, sent to the jury the following answer in writing * * *."

The court held (pp. 611, 612):

> "It is insisted, however, that this error was not prejudicial, that the charge as given was correct, and that under the provisions of section 269 of the Judicial Code as amended February 26, 1919 (U. S. Compiled Statutes, 1919 Supplement, volume 1, § 1246), this court has no authority to reverse a judgment for technical errors, defects or exceptions which do not affect the substantial rights of the parties.
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> "* * * There is nothing in this supplementary charge that changes, modifies, or adds to the charge as given. On the contrary, it is but a repetition of the general charge of the court upon the same subject-matter, and, though perhaps it is differently phrased, nevertheless it is substantially identical and could not have been prejudicial to either party."

The court distinguishes the case of *Fillippon v. Albion Vein Slate Co.,* 250 U. S. 76, 63 L. Ed. 853, relied on in the Circuit Court of Appeals opinion herein on the ground that in the Fillippon case the supplemental charge as given was erroneous and prejudicial in substance. The United States Supreme Court in the *Fillippon* case, *supra,* said (p. 856):

> "In this case, so far from the supplementary instruction being harmless, in our opinion it was erroneous and calculated to mislead the jury in that it excluded a material element that needed to be considered in determining whether plaintiff should be held guilty of contributory negligence under the particular hypothesis referred to in the jury's question."

In *Dodge v. United States* (C. C. A. 2) 258 Fed. 300, the

bailiff brought to the judge a communication from the jury asking whether the defendant could be convicted on the first count. Without giving counsel a chance to object, he replied through the bailiff, "Yes." Said the court (p. 305):

> "In the instant case it is evident that no possible harm resulted or could result from the communication which passed between court and jury. The communication gave the jury no information which was not contained in the original charge. While the judge should not have done what he did, to reverse on that ground would under the circumstances be so extremely technical that it does not at all approve itself to our judgment."

In *Outlaw v. United States,* (C. C. A. 5) 81 Fed. (2d) 805, certiorari denied 298 U. S. 665, 80 L. Ed. 1389, the jury during its deliberations communicated to the trial court through the bailiff that they desired a copy of the oral charge which had been given to the jury. Without notifying counsel, the court sent it to them. Said the court (pp. 808, 809):

> "* * * The bald contention is that the judge should have held no communication with the jury except in open court with the knowledge of the accused and his counsel. * * *
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> "Formerly there was a presumption of prejudice, and the error was reversible. We are of opinion that since the passage of the Act of Feb. 26, 1919, 40 Stat. 1181, 28 U. S. C. A. § 391, it may sometimes be otherwise. * * * There has been no authoritative determination of what is meant by 'technical errors' and 'substantial rights.' * * * errors of procedure which do not affect the result of the trial are certainly among the 'technical errors' which Congress may require, and has required, to be disregarded. While a private com-

> munication between judge and jury is usually irregular and erroneous, it may not in all cases prevent a constitutional or a legal trial. * * * If the jury had been recalled and the charge read to them in appellant's presence, no different result can be supposed. * * * The trial under review in Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 77, 39 S. Ct. 435, 63 L. Ed. 853, occurred before the passage of the statute under discussion and in the opinion no reference is made to it. The communication involved there was a new charge, and moreover, an incorrect one, amply distinguishing that case from this. * * *
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> "Finding no reversible error, we affirm the judgment."

See also *Ah Fook Chang v. United States,* (C. C. A. 9) 91 Fed. (2d) 805, decided July 26, 1937, where there was a communication by the court to the jury in reply to the jury's question.

In *Hagen v. United States* (C. C. A. 9), 268 Fed. 344, while defendant and his counsel were absent from the court room, the judge withdrew from the jury a confession made by one defendant and repeated a part of his charge relating to the effect of the confession. The court said (p. 347):

> "* * * At most, what occurred was but an irregularity, which should not have the effect to require that a trial be set aside, which in other respects was fairly and properly conducted."

See also *Peppers v. United States* (C. C. A. 6) 37 Fed. (2d) 346, and *Philadelphia & R. Ry. Co. v. Skerman,* (C. C. A. 2) 247 Fed. 269.

There is a definite conflict between the circuits as there are several cases in other circuits to the contrary.

THE CIRCUIT COURT'S DECISION THAT THE COURT OR JURY IN AN ACCIDENTAL DEATH CASE MUST FIND AGAINST SUICIDE AND FOR ACCIDENTAL DEATH IF THE EVIDENCE UNDER ANY REASONABLE HYPOTHESIS PERMITS SUCH FINDING, DOES NOT CORRECTLY STATE THE COLORADO RULE AND IS IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.*

The Circuit Court of Appeals relies on the case of *Prudential Insurance Co. of America v. Cline,* 98 Colo. 275, 57 Pac. (2d) 1205, decided January 27, 1936, rehearing denied March 30, 1936. The action there was on a straight life insurance policy and not on an accidental death claim. Plaintiff proved his case when he showed the death of the insured and nothing more. Defendant, to avoid liability, had to prove suicide within a year and the Colorado Supreme Court said (pp. 276, 277):

> "On January 18, 1933, the defendant insured the life of Agnes L. Bjorkman for $1,000 for the benefit of her husband, Ernest H. Bjorkman. The insured died within the year, to-wit, on October 18, 1933. Upon the refusal of the defendant to pay the amount of the policy, Bjorkman sued. So far as pertinent here, he alleged the issuance of the policy and the death of the insured. * * *
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> * * * * * * *
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> "The court gave the following instruction: 'Suicide must be proven, and if you can reconcile the facts of this case upon any reasonable hypothesis, based upon the evidence, that death of the insured was not caused by suicide, it is your duty to do so.' *As the defendant made no objection to the instruction, it became the law of the case.* Supreme Court rule No. 7. Its correctness is not challenged at this time. Was the evidence such as to exclude

*The Circuit Court's lauguage is that "if under the evidence death by violence can be explained on any reasonable hypothesis other than suicide, it is the duty of the court or jury to so find." (R. pp. 154, 155)

all reasonable hypotheses other than that of suicide?''

The court will observe that even for a life insurance case the Colorado court did not flat-footedly approve the instruction.

This ''reasonable hypothesis'' instruction is lifted almost verbatim from a popular defendant's instruction in criminal law, where it is used to compel the prosecution to prove its case beyond a reasonable doubt.*

Sometimes the word, ''supposition,'' is substituted for its synonym, ''hypothesis.''

If the Colorado Supreme Court intended to approve this drastic instruction in a *straight life* insurance case, the ruling seems doubtful enough. But certainly the intention should not be lightly imputed to that court to apply it to an *accident* insurance case where its effect is to reverse the burden of proof, relieve plaintiff of the duty of proving accident by a preponderance of the evidence, and compel defendant to prove that the death was not accidental, by evidence so conclusive as to virtually establish that fact beyond a reasonable doubt.

That it had no such intention is evident from an examination of two accident insurance cases which the Colorado court had under consideration at the same time as the *Prudential* case, *supra,* and which are reported in the same volume of the Colorado reports, and from the established Colorado rule as to the effect of presumptions laid down in *Roeber v. Cordray,* 70 Colo. 196, 199 Pac. 481.

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*See Brickwood-Sackett on Instructions to Juries, 3d ed. vol. 2, p. 1739, § 2709, where the following form instruction is set forth: ''In considering the evidence if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to do so and if you have a reasonable doubt of his guilt, you should acquit him.''

Incidentally, it should be borne in mind in the consideration of these cases that in the pending case there was no "unexplained violent external means." The undisputed verbal statements of insured as to why he did it, and his undisputed verbal act in pounding the dynamite in an effort to set off a second explosion, is a very clear explanation by the one who knew best and leaves no room for presumption or speculation.

In *North American Accident Insurance Co. v. Cavaleri,* 98 Colo. 565, 58 Pac. (2d) 756, decided May 30, 1936, and on rehearing, June 15, 1936, the suit was on an accident insurance policy and the court said (p. 566):

> "In order to recover on a policy insuring against accidental death, a plaintiff must prove that the insured died as the result of an accident."

And in *Capitol Life Ins. Co. v. Di Iullo,* 98 Colo. 116, 53 Pac. (2d) 1183, decided December 23, 1935, and rehearing denied January 27, 1936, the court clearly distinguishes between the proof necessary under a straight life insurance case, such as was at issue in *Prudential Co. v. Cline, supra,* and an accident insurance case, such as was passed on in the *Cavaleri* case *supra,* saying (p. 118):

> "In the case of a straight life insurance policy providing for the payment of money upon the death of the insured the condition upon which liability depends is the death of the insured, and, his death being shown, within the coverage of the policy, * * *.
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> "* * * Where, however, a policy provides for the payment of money upon the death of the insured as a result of accident, there are two conditions upon which liability depends; namely, (1) death of the insured and (2) accidental cause of such death. * * * *But under the double indemnity provision no liability arises unless death results from accident. Suicide by the insured while sane is not an accident.* * * * *There is no liability on the part of the insurer, not because the insured com-*

mitted suicide, but because there was no accident, and, as we have seen, the double indemnity clause provides for payment only in case of death by accident. It does not cover nonaccidental death. It may just as reasonably be held that on a straight life insurance policy, providing for the payment of money on the death of the insured, the insurer is liable where there has been no death, as to hold that on a policy providing that money shall be paid in case of death by accident, the insurer is liable where there has been no accident."

The distinction made by the Colorado Supreme Court is in accord with the rule laid down by the United States Supreme Court in the *Gamer* case (303 U. S. 161). It clearly does not sustain the interpretation of the Colorado law made by the Circuit Court of Appeals.

In *Occidental Co. v. U. S. Bank,* 98 Colo. 126, 53 Pac. (2d) 1180, decided December 23, 1935, in an action on an accidental death policy the Court said (p. 131):

> "When death by unexplained violent external means is established, the law does not presume suicide or murder; the presumption is to the contrary. Such a showing is prima facie proof that the death was accidental" (citing cases). "But that prima facie showing may be overcome by evidence, either direct or circumstantial. In the present case there was more than the bare fact of death by unexplained violent external means; there were circumstances sufficient to require a finding whether the death was accidental or suicidal."

See, also, *Bickes v. Travelers Insurance Company,* 87 Colo. 297, 287 Pac. 859.

The settled rule in Colorado as to the effect of such presumptions as those against suicide and against insanity is found in *Roeber v. Cordray,* 70 Colo. 196, 199 Pac. 481.

The Colorado Supreme Court there said (pp. 197, 198):

"By offering the will for probate the proponent, in effect, asserted that it was executed by Roeber at a time when he was of testamentary capacity. This proposition has the benefit of the presumption of sanity which the law raises. The presumption being one of fact, it is only a matter of evidence and does not in any sense relieve the proponent of the obligation to establish by a preponderance of evidence the affirmative of the issue tendered. If no evidence to the contrary is introduced, a case is made, but if such evidence be introduced the question then is whether upon the whole evidence, including this presumption, the burden of proving the affirmative has been sustained.

"If the evidence be evenly balanced, the finding will be for the contestant" (citing cases and quoting with approval the following from *Young v. Miller,* 145 Ind. 652): " 'A prima facie case, made by the plaintiff, must always stand unless its force is broken by the defendant's evidence; but the defendant is never required, under the general denial, to negative the truth of the plaintiff's prima facie case by a preponderance of the evidence. If, upon the whole evidence, the plaintiff does not have a preponderance, the defendant must recover. If the scales are equally balanced the plaintiff must fail. It is perfectly clear, therefore, that to break the force of a prima facie case it is not necessary that the contrary shall be established by a preponderance of the evidence but that it is sufficient if from the evidence pro and con the plaintiff cannot be said to have a preponderance upon his side of the issue.'

"So far then as this instruction places upon the contestants *the burden of proving a want of testamentary capacity,* the instruction is wrong, and was undoubtedly prejudicial."

The Circuit Court of Appeals has taken this doubtful life insurance rule (where the burden was on defendant) and applied it to an accident case (where the burden was on plaintiff), moreover, to one in which there was no unexplained violence. The court's interpretation of the Colorado law is clearly incorrect and in conflict with the Colorado decisions which despite the presumption require plaintiff to establish his case by a preponderance of the evidence. The Circuit Court reversed on its erroneous assumption that Colorado did not so require.

THE SAID RULING IS LIKEWISE IN CONFLICT WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT AND WITH THE CIRCUIT COURTS OF OTHER CIRCUITS.

In *New York Life Insurance Company v. Gamer,* 303 U. S. 161, 82 L. ed. 726, the action was on the provision of a life insurance policy calling for double indemnity in case of accidental death. The lower court, as did the Circuit Court in this case, placed the burden of proving suicide on the defendant saying (p. 167): "The presumption of law is that the death was not voluntary and the defendant, in order to sustain the issue of suicide * * * must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary * * *."

The Circuit Court of Appeals in the pending case has gone much further than did the lower court in the *Gamer* case. In the pending case the Circuit Court has not only placed the burden of proof on the defendant, but has in effect declared that it must prove suicide beyond a reasonable doubt or the jury must bring in a verdict for plaintiff. The Supreme Court in holding that even the comparatively mild instruction in the Gamer case above quoted placed an improper burden on the defendant and in reversing the case, said (pp. 171, 172):

> "Under the contract in the case now before us, double indemnity is payable only on proof of death by accident as there defined. The burden was on

plaintiff to allege and by a preponderance of the evidence to prove that fact. * * *

"* * * The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence."

The ruling of the Circuit Court in the pending case is in clear and direct conflict with this decision of the United States Supreme Court.

In *Jefferson Standard Life Ins. Co. v. Clemmer* (C. C. A. 4) 79 Fed. (2d) 724, the insured was found in a locked bedroom dead from a pistol wound in his forehead, the weapon lying in a pool of blood at his feet. He was a young, vigorous man in good health, fond of athletics and of a happy disposition. There was evidence that shortly before his death he was worried over the condition of a young woman he had gotten in trouble. The defense was that the pistol was rusty and might have been accidentally discharged while he was attempting to clean it. It was also suggested that the pistol might have been discharged by a fall to the floor, and that decedent accidentally dropped it and received the fatal wound. The court held the case should never have been submitted to the jury, but defendant should have had a directed verdict.

The instruction of the lower court was in accord with the Circuit Court's statement of the law in this case—the instruction that, "the burden rests upon the defendant to produce evidence to overcome the presumption of accident and to satisfy the jury that the death was suicidal; and that this burden upon the defendant is met when the jury is satisfied that there is no other reasonable explanation of

the death but suicide." The court, in reversing the case, severely criticises the instruction, saying (p. 731):

> "* * * But when the court goes further and introduces the presumption itself as evidence to be considered by the jury, or places the burden on the defendant to satisfy the jury by a preponderance of evidence, he states the principle too strongly and may cause a miscarriage of justice; *and a fortiori, when he imports into the trial the rule of reasonable doubt applicable in prosecutions for crime, he makes it wellnigh impossible for the jury to find for the defendant.* The result has been in many cases of self-destruction to be found in the books, that judge and jury alike have been unable to take a common-sense view of the facts of life, and have seemed to be the only persons in the community who did not clearly understand what had taken place.
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> "The differences that have arisen as to which party bears the burden of persuasion in insurance cases, when the defense is based on suicide, have been caused in part by a failure to distinguish between cases in which the plaintiff sues on an accident insurance policy or the double indemnity clause of a life insurance policy, and cases in which the insurer in a life policy raises the defense of suicide. If death from any cause except suicide is insured against, the burden is on the company to prove the exception; but if death from one specific cause, such as accident, is insured against, the burden is on the policyholder to show that the condition precedent to liability has taken place. Home Benefit Ass'n. v. Sargent, 142 U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160; Parrish v. Order of United Commercial Travelers (C. C. A.) 232 F. 425; Travelers' Ins. Co. v. Wilkes (C. C. A.) 76 F. (2d) 701; Wigmore

on Evidence, section 2510 (b) (c). Compare cases in note 4. The incidence of the burden of persuasion in these cases is governed by the general principles relating to the subject unaffected by the presumption against suicide."

In *Provident Life & Accident Ins. Co. v. Nitsch* (C. C. A. 5) 123 Fed. (2d) 600, decided Nov. 9, 1941, the court said (p. 603):

> "* * * In the many cases decided by this court, pains have been taken to point out the difference between the situation where the question of accidental death comes up on the defense of suicide where the suit is on a life policy, and where it comes up on a suit on an accident policy alleging accidental death. In the first class of cases, the burden is on the defendant to prove suicide and there is a presumption against it. In the second class the burden is on the claimant to show not merely that there was death by violence but that the violence was accidentally rather than intentionally inflicted."

To the same effect are *Reliance Life Ins. Co. v. Burgess* (C. C. A. 8) 112 Fed. (2d) 234; and *Scales v. Prudential Ins. Co. of America* (C. C. A. 5) 109 Fed. (2d) 119.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT IN THE DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO TAKE THE CASE TO THE JURY THE FEDERAL COURT IS BOUND BY THE STATE RULE, IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Circuit Court of Appeals assumes in its decision that the determination as to where rests the burden of proof is for the state court and that the federal court is bound to follow that determination. It erroneously construes the state decisions as holding that if there is any possibility of accident, the court and jury are bound to find accident. Its assumption that the *Cline* case *supra*

so holds is erroneous. So also is its assumption that if it were the Colorado law, the federal courts would be bound to follow the state ruling. This is directly contrary to decisions of the United States Supreme Court and many other circuits.

In *Crockett v. United States* (C.C.A. 4), 116 Fed. (2d) 646, decided Dec. 21, 1940, involving a question of negligence in an automobile accident case, the court said (p. 650):

> "On the question of the sufficiency of the evidence to take the case to the jury, the federal courts are not bound by the decisions of the state courts. As was said by Judge Parker of this court, in Gorham v. Mutual Benefit Health & Accident Association, 4 Cir., 114 F. 2d 97, 99, decided August 22, 1940: 'Furthermore, while according great respect to decisions of state courts in the matter of direction of verdicts, we are of opinion that this is a matter which is governed by federal practice, and not one wherein local law or local decisions are binding. It goes to the very essence of the exercise of the judicial function by the federal courts, and is in no sense a matter of local law.' "

To the same effect are *Gorham v. Mutual Benefit Health & Accident Ass'n.,* (C. C. A. 4) 114 Fed. (2d) 97, decided Aug. 22, 1940, involving a suit on a policy of accident insurance, and *Herron v. Southern Pac.* 283 U. S. 91, and *New York Life Ins. Co. v. Sparkman,* (C. C. A. 5) 101 Fed. (2d) 484.

THE ERROR IN INSTRUCTING THE JURY WAS NOT REVERSIBLE IN THE LIGHT OF RULE 61 OF THE RULES OF CIVIL PROCEDURE AND OF SECTION 391, TITLE 28, UNITED STATES CODE ANNOTATED.

The rule provides that nothing done by the court is ground for granting a new trial "unless refusal to take such action appears to the court inconsistent with substantial justice." The statute provides that on appeal the

court shall give judgment after an examination of the entire record without regard to technical errors which do not affect the substantial rights of the parties. An examination of the entire record in this case is convincing that substantial justice was done and that the error complained of affected no substantial right and had no effect whatever on the verdict.

In *Bruno v. United States,* 308 U. S. 287, 84 L. Ed. 257, Mr. Justice Frankfurter speaking for the court said, relative to the refusal of the trial judge to instruct that the failure of defendant to testify did not create a presumption against him in a criminal case (p. 294):

> "Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that *that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict.* Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him."

In *Berger v. United States,* 295 U. S. 78, 79 L. Ed. 1314, decided April 15, 1936, the Court said (p. 1318):

> "Evidently Congress intended by the amendment to § 269 to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. See Haywood v. United States (C.C.A. 7) 268 F. 795, 798; Rich v. United States (C. C. A. 8) 271 F. 566, 569, 570."*

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*Compare *McCandless v. United States,* 298 U. S. 342, 80 L. Ed. 1205; *Lynch v. Oregon Lumber Co.* (C.C.A. 9) 108 Fed. (2d) 283; *Morgan v. United States* (C.C.A. 8) 98 Fed. (2d) 473; *Nash v. United States* (C.C.A. 2) 54 Fed. (2d) 1006.

In *Morgan v. Sun Oil Co.* (C.C.A. 5) 109 Fed. (2d) 178, decided January 15, 1940, the court said (p. 181):

> "Harmless error is not ground for setting aside or disturbing a verdict or judgment. *We sit to do substantial justice and where, as here, after an examination of the entire record before us it appears that substantial justice has been done, the judgment will not be disturbed.* Rule 61 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c; 28 U.S.C.A. section 391."

In *Morgan v. United States* (CCA 8) 98 Fed. (2d) 473, decided August 9, 1938, the court said (p. 477):

> " 'If the judgment is right, the end of the law has been attained, and it ought not to be disturbed.' "

citing cases.

In *Snyder v. Massachusetts,* 291 U. S. 97, 78 L. Ed. 674, Mr. Justice Cardozo, speaking for the court, said (p. 687):

> "* * * There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In 25 *Virginia Law Review,* 261 (Jan., 1939), Dobie, the well-known writer on federal procedure, said of this rule:

> "It is fondly to be hoped that the federal judges will appreciate that this rule really means what it says. This sentence" (the second sentence of the rule) "put in out of abundant caution, merely

briefly and generally restates in different words the same idea contained in the first sentence. Certainly it is directly opposed to the ancient law that prejudice will be presumed from any error."

CONCLUSION.

For the foregoing reasons it is submitted that a writ of Certrorari should issue to the Circuit Court of Appeals for the Tenth Circuit.

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